Reportable

THE LABOUR COURT OF SOUTH AFRICA, HELD AT JOHANNESBURG

Case no: J 376/12

In the matter between:

DUNCAN SITHOLE **Applicant**

and

ENLIGHTENED SECURITY FORCE (PTY) LTD **First Respondent**

MANUEL KING DUBE **Second Respondent**

Heard: 26 August 2016

Delivered: 11 October 2016

Summary: Contempt proceedings – *prima facie* evidence of a settlement in full and final payment of all claims of any nature whatsoever arising from the termination of the employment of the employee settlement of claims arising – court cannot *mero motu* set the same aside – in the event that it was binding the court order making the arbitration award an order of court ought never to have been issued – existence of settlement agreement creates sufficient doubt that the ongoing failure to comply with the court order is mala fides)

JUDGMENT

LAGRANGE J

Introduction

[1] This matter has a protracted history since the applicant obtained a default arbitration award in his favour on 15 January 2012. In the default arbitration hearing he claimed that he had been dismissed for referring to the CEO of the first respondent ('the company') as 'a Zimbabwean', supposedly as a term of disparagement, and for failing to disclose that he had a criminal record for a drunken driving offence at the time he was employed. He denied ever disparaging the CEO as alleged and claimed that he had disclosed his criminal record to the chief operating officer of the company and the national operations manager at the time. The arbitrator found that his dismissal was substantively unfair and ordered that the company should reinstate him with effect from 1 February 2012 as well as pay him two months' salary which he claimed he had not been paid.

[2] On 29 July 2014, the applicant obtained a default court order making the arbitration award an order of court. Although the application was unopposed, the respondents do not claim to have been unaware of these proceedings. A copy of the judgement was served on the company on 21 January 2015. Shortly afterwards, on 6 February 2015, a writ of execution in the amount of R 20,000 was issued by the registrar, but it appears that no further steps were taken by the applicant to pursue this. On 20 August 2015, he instituted contempt proceedings against the company and Mr Steven Dube ('S Dube'), who was cited as the chief executive officer of the company. At that stage S Dube was cited as the second respondent in the contempt proceedings.

[3] On the first occasion the matter was heard on 20 November 2015, S Dube was the found guilty of contempt and a writ of committal was issued to bring him before court to show cause why he should not be ordered to comply with the court orders.

[4] The respondents ultimately opposed the contempt application. In his answering affidavit in defence of the claim that he had acted in contempt of the court order, S Dube admitted to being the chairperson of the Enlightened Group, which owned the company amongst other companies

but denied being a director of the company. Apart from this, he also denied having received personal service of the rule *nisi* of 11 September 2015, which initiated the contempt proceedings and called upon him to show cause why he should not be found guilty of contempt. He further asked the court for an opportunity to allow the respondents to apply to set aside the warrant of committal and also "to revisit the CCMA award" which was made an order of court. He further confirmed that R 20,000 had been paid into the trust account of the applicant's attorneys of record, though there is some dispute whether that was paid in for the purpose of providing security for the amount that could be attached in terms of the writ or as part of a tender of settlement. However, in these proceedings nothing turns on that.

[5] On 8 December 2015, the previous order of 20 December was rescinded and the matter was re-enrolled for a fresh contempt hearing on 19 February 2016. On that occasion, S Dube was excused from further attendance at the proceedings and was replaced as the second respondent by Mr M K Dube ('M Dube'), the managing director of the company, with the matter eventually being re-enrolled for a hearing on 14 April 2016. Thereafter the hearing was postponed on three further occasions, the last postponement being on 26 August 2016 when it was postponed to allow the respondents to investigate the status of a review application under case number JR 544/12 and to engage in settlement discussions. On 15 April and 27 May 2016 costs of the postponements were reserved. It would seem to be common cause that the matter was postponed by agreement on 15 April and that the parties were at that stage contemplating settlement of the dispute. S Dube then passed away on 23 April 2016. On 26 August 2016, the respondents were ordered to pay the wasted costs of the hearing.

[6] The day before the hearing on 27 May, the respondent launched a futile application to rescind the default arbitration award. The application was patently futile because the award had already been made an order of court and could not be revisited as long as the court order of 29 July 2014 still stood. Unsurprisingly, the arbitrator refused to condone the late filing of the rescission application in any event. In the course of the arbitrator's

ruling, he pertinently noted that the default arbitration award had already been made an order of court and yet it did not take steps to set aside the award when it became aware of the court order.

[7] By the time the matter was re-enrolled on 19 September 2016, the respondents were able to unearth some further partial details about the review application.

[8] In order to prove contempt, the applicant must establish that the order of the court has been brought to the knowledge of the respondent and that the respondent has failed to comply with it, wilfulness and *mala fides* on the part of the respondent will normally be inferred and the onus will be on the respondent to rebut this inference on a balance of probabilities"[1] A company director who, with knowledge of an order of court, caused the company to disobey the order, is personally guilty of contempt of court.[2] Rebuttal can be achieved by the respondent establishing that s/he did not intentionally disobey the Court's order.[3]

[9] There is no dispute that the court order was served on the company. There is also no dispute that M Dube has been personally aware of the court order since 24 May 2016. It is common cause that the applicant has not been reinstated by the company since the date of the award. The respondent's main defences to the charge of contempt as articulated on 26 May 2016 in the opposing affidavit of M Dube may be summarised as follows:

9.1 To comply with the order by reinstating the applicant would be in breach of section 38(3)(g) read with section 20 of the Private Security Industry Regulation Act, 56 of 2001 ('PSIRA').

9.2 The applicant had never tendered his services for reinstatement since the award was issued.

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[1] *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc and others* 1996 (3) SA 355 (A) at 367I-J

[2] *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd and others* 2006 (5) SA 333 (W) at 351-2, para [16.8]; *Twentieth Century Fox Film Corporation & others v Playboy Films (Pty) Ltd & another* 1978 (3) SA 202 (W) at 203C-E

[3] *Putco Ltd v TV Radio Guarantee Co (Pty) Ltd and other related cases* 1985 (4) SA 809 (A) at 836E-G

9.3 The applicant had delayed in enforcing the award.

9.4 The company had a *bona fide* defence against the applicant's unfair dismissal claim.

9.5 The existence of the pending the rescission application in respect of the original default award.

[10] In supplementary affidavits filed on the date of the previous hearing, the respondents' attorney alluded to the existence of the review application under case number JR 544/12. The respondent submitted that the contempt application ought not to proceed because the outcome, if any, of the review application could have an impact on the contempt proceedings.

[11] Attached to the supplementary affidavit of the respondents' attorney of record were the following:

11.1 A notice of "intention to defend" the review application signed by the applicant dated 23 may 2012.

11.2 A notice filed on 25 April 2012 by the company in terms of rule 7A (8) (b) of the Labour Court Rules.

11.3 A notice of withdrawal as attorneys of record, by the company's former attorneys of record in the review application filed on 20 December 2012.

[12] In a further supplementary affidavit filed on 14 September 2016 by the respondent's attorney of record, the additional documents obtained from the CCMA and from the applicant's employee file, which were allegedly recovered from archives held by Document Warehouse on 29 August 2016 were discovered.

[13] In the applicant's employee file there was a purported agreement dated 20 April 2012 in terms of which he supposedly agreed that his contract "was terminated by mutual agreement" and that he accepted an amount of R4225.71 "as full and final payment of all claims of any nature whatsoever arising from the termination of the employment of the employee with the company." No person appears to have signed this document on behalf of the company, though the applicant does not dispute signing it. The respondents also attached copies of documentary evidence of payment of

such an amount to him and an acknowledgement of receipt thereof by the applicant. The details on the remittance advice which the applicant appears to have signed on 20 April 2012 describe the details of the payment as a “final payment for the month of January 2012”.

[14] Further documents belatedly produced by the respondents included the applicant’s CV in which it was stated that he had no criminal convictions and the outcome of his disciplinary hearing in which the basis for his dismissal was his failure to disclose his previous criminal convictions, though he also had been charged for referring to the CEO as a Zimbabwean.

[15] The respondents’ attorney’s affidavit also refers to documents found in the original CCMA dispute file under case number GAJB 32519-11. The only ones of interest for present purposes was a notice of a review application served on the CCMA on 8 March 2012 in respect of case number JR 544/12 and filed with the court on 12 March 2012. Another document relating to the review was a notice issued by the CCMA in terms of rule 7A (3) of the Labour Court Rules, which appears to have been filed on 16 March 2012. Lastly, there is an extract from what appears to be the CCMA case management system in respect of the CCMA case which contains various entries that appear to have been entered in the system. The extract bears a CCMA stamp dated 6 September 2016, but no affidavit was obtained from any CCMA official purporting to explain or confirm the entries in the extract. The material content of the extract is set out in the table below which roughly approximates the format of the extract.

Events for Case GAJB 32519-11 Page 1 of 1							
P#	Process	E#	Commissioner	Start date	End date	Stage	Outcome
1	Con/Arb	1	StephenN	10-Jan-12 09:3?[4]	10-Jan-12 10:0?	Heard	Not Settled and Completed: Non-Attenda?
1	Con/Arb	2	StephenN	10-Jan-12 12:0?	10-Jan-12 12:1?	Heard	Arbitration Award Set Aside by Labour

[4] ? - Indicates that text was incomplete in the copy of the extract.

2	Review	0		12-Mar-12 15:3?	12-Mar-12 15:?	Done	Set Aside
3	In Limine	3	GcobisaG	04-Jul 16 17:0?	04-Jul 16 18:0?	Heard	Out of jurisdiction

[16] The entries in the first, second and fourth content rows in the table appear to correspond to records recording the original con/arb hearing on 10 January 2012 and the rescission ruling in July 2016. The third content row is difficult to reconcile with the sequence of events in the sense that the last column in that row appears to suggest that the review application resulted in the award being set aside, but this entry was apparently made on 12 March 2012 at a stage when the CCMA had not even lodged the record of the proceedings in with the Labour Court. Similarly, the reference to an arbitration award being set aside in the last column of the second content row also does not make sense with reference to the apparent date of the entry of 10 January 2012. According to the respondents, the contents of the review file could not be traced at the Labour Court.

[17] Accordingly, other than the cryptic and problematic references in the CCMA record, little is known about the fate of the review application beyond the fact that it was launched and that the CCMA filed a record of the arbitration proceedings. The review application was not initiated by the respondent's current attorneys of record but by their predecessors S Nkadimeng Attorneys, who withdrew from the review application on 20 December 2012. The applicant's current attorney of record, Mr G Botha, claims that he spoke to Ms Nkadimeng on 14 September 2016 who advised him that she was unaware that the matter had been settled and that her last work on the file was the launching of the review application and that no opposing affidavit was received. No confirmatory affidavit was obtained from her to confirm the extent of her involvement by the time the matter was heard on 19 September 2016.

[18] Based on the above, the respondents raised a new defence that in fact the applicant had fully and finally settled his dispute on 20 April 2012. This defence is based purely on the newly discovered documents and not on

any independent recollection of the events by anyone employed by the company or engaged by it as attorneys of record.

[19] In his supplementary affidavit in reply, the applicant contended that the amount of R4225.71 was in fact a payment for three days during which he had been suspended in September 2011 and attached documentation in support of his suspension. He also points out that given that the CCMA award in his favour required the respondent to pay him R 20,000 as a cash component it was highly improbable that a settlement agreement which included his unfair dismissal dispute would have been reached on the basis of the sum he was actually paid.

Evaluation

The tendering of services

[20] On the evidence, I am satisfied that, whatever may have transpired before the arbitration award was made an order of court, the company ought to have attempted to comply with the order. There is not a shred of evidence that even once the contempt proceedings were underway that the respondent made any attempt to give effect to the reinstatement order. Even if the respondents contend that the applicant had not tendered his services, the obligation rested on it to give effect to the court order and it should at least have invited him to return to work so it could give effect to the order. The respondents do not even bother to explain their abject failure to do anything to implement the order once they were aware of it. If the matter were to be decided on this point alone, I would have little hesitation in deciding that their failure to comply with the order was wilful and deliberate.

The effect of sections 38(3)(g) read with s 20 of PSIRA

[21] The first point to make about this defence is that it is apparent that the applicant was not dismissed because his employment would have been in breach of this provision but simply on the basis that he had not disclosed that he had been convicted of an offence relating to driving under the influence of alcohol. Section 38(3)(a) and (g) of PSIRA state:

"(3) Any person who-

(a) contravenes or fails to comply with section 20 (1) or section 26 (3);

....

(g) knowingly or without the exercise of reasonable care contracts for the rendering of security services contrary to a provision of this Act or the Levies Act;..."

Section 20 of PSIRA contains the following provisions, *inter alia* –

"20 Obligation to register and exemptions

(1) *(a)* No person, except a Security Service contemplated in section 199 of the Constitution (Act 108 of 1996), may in any manner render a security service for remuneration, reward, a fee or benefit, unless such a person is registered as a security service provider in terms of this Act.

(b) A Security Service contemplated in section 199 of the Constitution may use persons employed by them and who are not registered as security service providers to render a security service.

(2) A security business may only be registered as a security service provider-

(a) if all the persons performing executive or managing functions in respect of such security business are registered as security service providers; and…

(emphasis added)

In turn, the relevant security service provider registration provisions state the following:

"23 Requirements for registration

(1) Any natural person applying for registration in terms of section 21 (1), may be registered as a security service provider if the applicant is a fit and proper person to render a security service, and-

(a) is a citizen of or has permanent resident status in South Africa;

(b) is at least 18 years of age;

(c) has complied with the relevant training requirements prescribed for registration as a security service provider;

(d) was not found guilty of an offence specified in the Schedule within a period of 10 years immediately before the submission of the application to the Authority;…"

(emphasis added)

[22] What the respondents appear to be saying, in a way that is not very clearly articulated in their papers, is that since the applicant had a criminal conviction they could not reinstate him because he could not be registered as a security service provider in terms of section 23 (1) (d) of PSIRA. If they did the company would then be in breach of its own requirements for legal registration in terms of section 20 (2) (a) of the Act which would be unlawful. However, nowhere in the respondents' affidavits do they indicate whether the criminal offence of the applicant falls within one of the listed criminal offences falling under the Schedule 23 (1) (d) of PSIRA. On the evidence therefore, I am not satisfied that the respondents have established the facts on which this defence rests.

[23] Moreover, it is apparent that even if the respondents believed that the applicant's criminal record was a bar to his employment because of the threat which it presented to its registration and which might render it criminally liable in terms of section 26 (3) (g) of PSIRA, the Act provides a procedure for dealing with such a suspected breach on the part of the applicant in section 26(1), viz:

"**26 Suspension, withdrawal and lapsing of registration**

(1) If there is *a prima facie* case of improper conduct in terms of this Act, or of the commission of an offence referred to in the Schedule, against a security service provider, the Authority may suspend the registration of the security service provider-

(a) pending the conclusion of an investigation or enquiry by the Authority into the alleged improper conduct;..."

What this section provides is that an employer who is concerned that it is employing someone in contravention of the Act because of their criminal record, may suspend them on pay pending a determination of whether or not their employment is a contravention of the Act. Thus, PSIRA would not prevent the reinstatement of the applicant and suspension in terms of that

provision, and accordingly it does not appear that this would present an insuperable obstacle to the court compelling the respondents to comply with the court order making the arbitration award an order of court.

Miscellaneous defences

[24] For the sake of completeness, I will briefly address the alternative defences that the applicant had delayed in enforcing the award and that the respondents believe they had a *bona fide* defence to his unfair dismissal claim. I have dealt with the defence based on the claim that it would be unlawful and unconscionable of the court to compel the respondents to comply with the court order because it would supposedly entail them committing an offence under PSIRA. As far as the company may have had good cause for dismissing the applicant on the basis that he had not disclosed his criminal conviction and that his trustworthiness was therefore in doubt, that is not something this court can entertain in contempt proceedings. That is an issue which goes to the substantive merits of the applicant's claim of unfair dismissal and the respondents had an opportunity to deal with that in the course of the review proceedings. Once the court confirmed the arbitration award as an order of court, the respondents were bound to comply with it whatever their misgivings about the merits of the original dismissal. Likewise, it is irrelevant how long the applicant took to try and enforce the award or the court order: that is not a bar to him seeking to give effect to the rights acquired under the order.

[25] Accordingly these ancillary defences are without merit.

The purported settlement of the dispute

[26] I agree with the respondents that it is unlikely that the amount in the document which it claims was a comprehensive settlement agreement, could have corresponded to three days wages for the period that the applicant was on suspension September 2011 because his monthly wage at the time was approximately R10, 000 per month and accordingly the amount in question would have been closer to two weeks' wages. However, I have serious doubts that the document probably was intended by the parties to comprehend and include the settlement of the applicant's

unfair dismissal dispute, assuming for present purposes that indeed it was an agreement between the parties.

[27] I am also inclined to agree with the applicant that it is incomprehensible and inherently implausible that an agreement could have been concluded in terms of which he would have waived an award in his favour reinstating him and the payment of R 20,000 due to him, simply on the basis of a cash payment of approximately R4, 200. Moreover, it is evident that the amount was clearly arrived at as a result of some detailed calculation, which appears to be borne out by the form on which he acknowledged receipt of payment indicated, not an amount arrived at in the process of negotiating a compromise of his entitlements under the award. The amount on the receipt form described it as his final payment for the month of January 2012. Had it been a settlement of his dismissal dispute and had it amounted to an abandonment of the arbitration award in his favour, it is highly improbable that the description of the payment would not have made some reference to it being a settlement of a much larger dispute. Nonetheless, the fact remains that on the face of the document which the applicant does not dispute signing, it would appear that he had compromised his claim.

[28] It is clear from the above that I have severe doubts about the legal status of the settlement, and that there is good reason to believe it might be set aside if the applicant made a fully substantiated application to court for such relief. However, I had not been referred to, nor have I been able to find any authority which would give the court the power to set aside the purported settlement of its own accord in the absence of a proper application to do so by either the applicant or the company.

[29] In the circumstances, whilst I appreciate that this defence was belatedly raised, it does create sufficient doubt in my mind about whether the respondents *continued* opposition to complying with the court order was *mala fide* even if it was deliberate. For this reason only I am not satisfied that all the elements necessary to establish the offence of contempt of the court order have been proven.

[30] However, as long as the court order remains in force and is not set aside, or its operation suspended by an order of this court, or the applicant agrees to abandon it as part of a settlement, then even if the respondents believe they might have good grounds for setting it aside on account of the purported settlement, the respondents remain legally obliged to comply with it. They cannot simply continue with their non-compliance with the order because they *believe* they would have good grounds for rescinding it. The only basis on which they have been acquitted of the charge of contempt on this occasion is that it is possible they may *bona fide*, but mistakenly, have believed on the basis of the purported settlement that the document excused them from complying with the court order. That defence cannot avail them going forward. The existence of the disputed settlement document does not by its mere existence render the court order unenforceable.

Relief

[31] Although, on this occasion I must acquit the respondents of the charge of contempt of the court order of 29 July 2014 up to and including the date of this judgement, the court order still stands and must be complied with.

[32] Whether the court order should be set aside or whether the alleged settlement of the dispute should be set aside are regrettably not issues the court can determine in these proceedings nor can it dictate the future conduct of the parties in regard thereto. Nevertheless, the respondents are cautioned that their acquittal on the charge of contempt on this occasion does not relieve them of their obligations to comply with the order of 29 July 2014 as long as it remains in force, unless this court orders otherwise or the applicant abandons the order in his favour.

[33] On the question of costs, I am satisfied that the respondents' conduct for the most part has been one of prevarication and their defence to the charge of contempt has been one that evolved over the length of these contempt proceedings. Their ineptitude and dilatoriness in investigating the steps taken by the company in challenging the arbitration award and in advancing their defence to the contempt application is inexcusable. As a result, the applicant has been put to inordinate legal expense and, except

for the occasion when this court made an order for the respondents to pay the applicant's wasted costs for the postponement on 26 August 2016, I see no reason why the applicant should not recover all his legal costs in these contempt proceedings notwithstanding the acquittal of the respondents on this occasion.

Order

[34] The first and second respondents are acquitted of being in contempt of the order of Van Niekerk J dated 29 July 2014, which made the arbitration award dated 15 January 2012 issued under case number GAJB 32519-11 an order of court, only for the period up to and including the date of this judgement.

[35] The first and second respondents are jointly and severally liable for the costs of the applicant in the contempt proceedings, which must be paid on an attorney own client scale, the one paying the other to be absolved. This cost order excludes the wasted costs of the postponement on 26 August 2016, which were the subject matter of a separate cost order made on that date by Steenkamp J.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	T Seoka instructed by Winston Shawa Attorneys
RESPONDENTS:	G Botha of Gerhard Botha Attorneys